

Examiners' Comments on the 2012 Examination

Head II: Civil & Criminal Procedure

The Overall Performance of Candidates

1. There was a larger number of candidates this year, and a clear drop in the number of candidates whose answers were plainly well below the standard required for a pass. This is reflected in the much improved pass rate. It seems that there were less speculative applications to sit the examination by candidates who were not ready. This is a welcome development, both for the examiners and the candidates themselves.

The Standard and Format of the Examination

2. The Examination, as in previous years, was open book.
3. The Examination was premised on the standard to be expected from the Day One Lawyer. The Day One Lawyer is one who has completed both the academic and vocational stages necessary for professional qualification. In Hong Kong that means the LL.B (or a non-law degree and the CPE), the PCLL and the two year training contract. Day One Lawyers should have a sound base of substantive knowledge and have acquired the ability to apply that knowledge to straightforward situations. In reality those taking the examination will be more than Day One Lawyers because of experience obtained in their home jurisdictions. Even so the Panel was careful to focus on the "Day One" standard and to keep away from what might be classed as "advanced procedure" or "superior ability". A Day One Lawyer intending to practise in Hong Kong should, however, have the ability to demonstrate an appreciation of the structure, powers and responsibilities of Hong Kong's Courts and have a basic knowledge of what is required in advising and representing clients in litigious matters. They should not be a danger to the client, as some candidates would have been, if permitted to pass.
4. If it is to have any value in ensuring that those seeking to practise in Hong Kong are of a suitable standard, the examination must test both substantive knowledge and the ability to apply that knowledge. As with any professional qualifying examination, the Panel was concerned to set questions which would test substantive knowledge and the ability to apply that knowledge in a constructive, practical and common sense manner.

General Comments

5. There were five questions in the paper, and candidates were required to answer any four of those questions. The time allowed was 3 hours and 30 minutes. The first 30 minutes is intended to allow candidates an opportunity to read and digest the questions in the paper and to plan their answers before starting to write. However, candidates can start to write their answers as soon as they wish. It is clear that many did so without planning their answers first. This is not a sensible approach to take.
6. We noted last year that some candidates, having identified the general theme of a question, then disgorged all their knowledge on that subject without regard to the specifics of the question being asked; usually wasting valuable time and gaining no marks for so doing. There was a noticeable improvement this year, with most candidates alive to the nature of this examination, which mimics the situation of a solicitor asked to advise a client about a problem, and calls for directional practical answers.
7. As in previous years, the majority of candidates brought into the examination room a significant amount of materials, but it was yet again noted that such practice proved to be somewhat counter-productive. There is insufficient time in the examination to search such materials for the required answers. Preparation is required in order to be fully conversant with the content of such materials in order to be able to refer to the same in an efficient manner that results in a precise answer to the actual question. However, few candidates tried to excel on the questions which they seemed to know well, thus losing the opportunity to compensate for poor marks on other questions. Candidates ought to be aware that it can be to their advantage to do better than just pass an individual question.
8. The examiners felt that for some questions many of the answers were very similar from candidate to candidate. This may suggest that candidates have been relying on pre-prepared answers from an external source. This is permissible in an open book examination. However, candidates should be aware that higher marks will normally be available to candidates who focus on the question actually asked; a focus which may be lacking in general pre-prepared answers.
9. This year the pass rate for Head II was 78%, up from 66% last year. This year marks from the civil questions were generally higher than from the criminal questions; in contrast to last year which was the other way around.

Performance on individual Questions

10. Questions 1 and 2 addressed issues of criminal procedures.

Question 1

Question 1 had three parts on which marks were awarded. The first part required an appreciation of the legal factors involved in a ruling on the admissibility of a cautioned statement. The magistrate should rule on admissibility on the assumption the admission was made but in this case he went further and erred in actually finding the admission had been made before he had heard the entire case. Some candidates realized the distinction but many did not and instead focused narrowly on the rules and directions elements of voluntariness in the taking of a cautioned statement. The other two parts in the question were straightforward, and generally well answered.

Question 2

11. Many candidates who answered Question 2 scored quite well. Those who answered the question poorly confused the procedures under s79B and s79C and the age limits. Many did not consider the issue of the credibility of the witness. The number of candidates that did not know that the sentence could be raised on appeal was disappointing.
12. Questions 3, 4, and 5 addressed issues of civil procedure. The questions raised issues which could well land on the desk of a newly-admitted solicitor. The answers being sought were pitched at the level of sophistication to be expected of a lawyer at that stage, which in some cases was simply to spot the issue being raised. In many cases we were looking for common sense application of the law, rather than just a recitation of black letter rules.

Question 3

13. Question 3 was split into 3 parts: part 1 – on choice of forum – worth 10 marks; part 2 – on security for costs – worth 7 marks; and part 3 – on costs orders – worth 8 marks. The overall standard of answer was acceptable.

Question 4

14. Question 4 was split into 3 parts: part 1 – on preparation for a first meeting with a client – worth 10 marks; part 2 – on discovery and privilege – worth 6 marks; and part 3 – on sanctioned payments – worth 9 marks. This was a deliberately free-form question in which candidates were asked open questions, mimicking the realities of private practice. It appears to have been popular with candidates, since 57 out of 63 candidates chose to answer it. Overall, most candidates did quite well on this question. For part 1, many candidates were able to come up with a satisfactory list of the practical considerations. However, it was expected

that there should be some discussion of whether the proposed target of proceedings was worth suing and whether summary judgment would be available for a quick resolution. Many candidates missed these rather obvious practical considerations. Most candidates did very well on part 2. On part 3, there was some confusion as to whether the Calderbank Offer should be taken into account when making the costs order.

Question 5

15. Question 5 was split into 4 parts: part 1 – on service out of the jurisdiction – worth 8 marks; parts 2 and 3 – on summary judgement and the interaction with set-offs and counterclaims – together worth 11 marks; and part 4 – drafting an Order 14 summons – worth 6 marks. On Part 1, generally candidates knew how to get leave to service process out of the jurisdiction, but many failed to say how they would actually serve it – possibly the result of not reading the question carefully enough. Parts 2 and 3 were generally well-answered, but a not-insignificant minority of candidates missed the relevance of set-off and counterclaim altogether. These are issues which often arise in practice on summary judgment applications, so candidates need to have an understanding of them. Part 4 was fairly well done, but some candidates forgot to include the long title on the summons.

Conclusion

16. This paper's pass rate continues to improve. The criminal questions maintained the improvement seen last year, while the pass rate on the civil questions improved dramatically, to over 80% from 49% last year.

May 2013

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